

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2016/02479

In the matter between:

SOUTH AFRICAN AIRWAYS SOC LIMITED

PLAINTIFF

and

JAMES ROBERT CAMM

1st DEFENDANT

SONYA PETRINA NANUSES

2nd DEFENDANT

ROCHE CHANDRE MANETTI

3rd DEFENDANT

BRIGITTE EIMAN

4th DEFENDANT

MALIAH SAM

5th DEFENDANT

JOSEPH BRINKMANN

6th DEFENDANT

JUANITA SONYA KLASSEN

7th DEFENDANT

MELLIKEN HOFNIE

8th DEFENDANT

JEFFREY RUKERO

9th DEFENDANT

NAMFLEX PENSION FUND

10th DEFENDANT

**NAMFISA FINANCIAL INSTITUTIONS SUPERVISORY
AUTHORITY**

11th DEFENDANT

Neutral Citation: *South African Airways Soc Limited v Camm* (HC-MD-CIV-ACT-DEL-2016/02479) [2022] NAHCMD 103 (10 March 2022)

Coram: PRINSLOO J

Heard: 4 October -8 October 2021; 11 October – 13 October 2021; 24 November 2021

Delivered: 10 March 2022

Reasons: 11 March 2022

Flynote: Law of Delict - Claim of Damages – arising from irregular and high baggage expenditure by the plaintiffs Windhoek station – Investigations revealing extensive fraud, theft and irregularities in respect to and involving the fraudulent baggage claims that have taken place at the plaintiff’s Windhoek office. Court finding defendants acted with common purpose in issuing fraudulent invoices in support of the baggage claims filed in the AW307 claim forms– Defendants held jointly and severally liable. Court granting judgment in favor of the plaintiff.

Legislation – Evidence – Section 4 of the Civil Proceedings and Evidence Act 25 of 1965 – the court allowed to make the comparisons with other genuine specimen of handwriting of the defendant but with proviso that the court should do so with caution and in conjunctions with all the other factors. Court having considered hundreds of documents where 6th defendant’s handwriting appears and on an objective comparison of the handwritings – Court considering all the factors and the absence of evidence to the contrary, to find that it is indeed 6th defendant’s handwriting that appears on a multitude of the ‘vendor invoices’.

Summary: The plaintiff issued summons on 3 August 2016 against eleven defendants. The first nine defendants are prosecuted jointly and severally for damages

suffered by the plaintiff in the amount of N\$ 13 265 298.05 as a result of investigations of irregular and high baggage expenditure by the Windhoek station.

A further independent forensic investigation was conducted by the plaintiff's insurers during April 2014 and a report was received accordingly. Plaintiff pleads that because of the investigations it came to realise the extensive fraud, theft and irregularities in respect to and involving the fraudulent baggage claims that have taken place at the plaintiff's Windhoek office.

Of the nine defendants only six entered a notice of intention to defend, i.e. 1st, 2nd, 4th, 5th, 6th and 7th defendants. Of these defendants the defence of the 1st, 2nd and 7th defendants was struck on 11 September 2019 and on 20 March 2020 the plaintiff moved for judgment against these defendants which was granted. The 3rd, 8th and 9th defendants did not enter an appearance to defend and it would appear that the whereabouts of these defendants are unknown to the plaintiff. The 4th and 5th defendants entered into settlement negotiations with the plaintiff.

The only remaining defendant who chose to pursue this matter to trial is Joseph Brinkmann, the 6th defendant.

Mr Brinkmann denied that he worked together with other employees, with a common purpose to defraud the plaintiff and that he ever received any money from any of the defendants which he appropriated for himself. Mr Brinkmann testified that the only money he would receive would be to purchase baggage and he would return with the receipt and the change.

Mr Brinkmann testified that he could read and write and his highest grade in school was grade 8. He was presented with a page with his name printed on it as well as certain numbers by counsel and was requested to rewrite it in his own handwriting, which he did.

Held that that the court is allowed to make the comparisons with other genuine specimen of handwriting of the defendant but with proviso that the court should do so with caution and in conjunctions with all the other factors.

Held that after the court having considered hundreds of documents where Mr Brinkmann's handwriting appears and on an objective comparison of the handwritings the court is in the position, considering all the factors and the absence of evidence to the contrary, to find that it is indeed Mr Brinkmann's handwriting that appears on a multitude of the 'vendor invoices'. The court has no doubt in its mind that Mr Brinkmann, together with the other defendants, issued fraudulent invoices in support of the baggage claims filed in the AW307 claim forms.

Held accordingly that the defence raised by the defendant is false and stand to be rejected. The plaintiff has proven its case on a balance of probabilities and the 6th defendant, i.e. Mr Brinkmann should be held liable together with the 1st, 2nd and 7th defendants on a joint and several basis.

ORDER

Judgment is granted against the Sixth Defendant jointly and severally with the First, Second and Seventh Defendants against whom judgment was granted on 20 March 2020, the one paying first to absolve the others, in the following terms:

1. Payment in the amount of N\$ 13 265 298.05;
2. Interest at a rate of 20% per annum calculated from 19 August 2013 until date of payment in full;
3. No order as to costs.
- 4.

As against the Tenth Defendant

5. The Tenth Defendant is hereby authorized and ordered in terms of section 37D of the Pension Funds Act 24 of 1956, to deduct from the Sixth defendant as former members of the Namflex Pension fund now known as the Alexander Forbes Namibia Retirement Fund (Pension Section) the amount of N\$ N\$ 109 557.90
6. The Tenth Defendant is hereby authorized and ordered in terms of section 37 D of the Pension Fund Act, 24 of 1956 to pay the amounts to the Plaintiff or its nominees.

JUDGMENT

PRINSLOO J

Introduction

[1] It is necessary from the onset to discuss the background of this matter which was a long and arduous litigious journey. This matter found its genesis in the plaintiff issuing summons on 3 August 2016 against eleven defendants. The plaintiff only sought relief against the first nine defendants as the tenth and eleventh defendants are the Namflex Pension Fund¹ and Namfisa Financial Institution Supervisory Authority (Namfisa), against which the plaintiff does not seek any relief.

[2] The first nine defendants are prosecuted jointly and severally for damages suffered by the plaintiff in the amount of N\$ 13 265 298.05.

[3] Of the nine defendants only six entered an appearance to defend, i.e. 1st, 2nd, 4th, 5th, 6th and 7th defendants. Of these defendants the defence of the 1st, 2nd and 7th

¹ The tenth defendant was substituted with Alexander Forbes Namibia Retirement Fund on 31 January 2020 in terms of rule 43(2) of the Rules of Court.

defendants was struck on 11 September 2019 and on 20 March 2020 the plaintiff moved for judgment against these defendants which was granted in the following terms²:

'Default judgment is granted against the First, Second and Seventh Defendants jointly and severally, the one paying first to absolve the others, in the following terms:

1. Payment in the amount of N\$ 13 265 298.05;
2. Interest at a rate of 20% per annum calculated from 19 August 2013 until date of payment in full;
3. Cost of suit including such cost as occasioned by the employment of one instructed and one instructing counsel.

As against the Tenth Defendant

4. The Tenth Defendant is hereby authorized and ordered in terms of section 37D of the Pension Funds Act 24 of 1956, to deduct from the First, Second and Seventh defendants as former members of the Namflex Pension fund now known as the Alexander Forbes Namibia Retirement Fund (Pension Section) as follows:
 - 4.1 In respect of the First Defendant (James Robert Camm), an amount of N\$ 196 488.46.
 - 4.1 In respect of the Second Defendant (Sonya Petrina Nanuses), an amount of N\$ 683 452.46.
 - 4.3 In respect of the Seventh Defendant (Juanita Sonya Klassen), and amount of N\$1 078 035.74.
5. The Tenth Defendant is hereby authorized and ordered in terms of section 37 D of the Pension Fund Act, 24 of 1956 to pay the amounts prayed for in 4.1, 4.2, and 4.3 to the Plaintiff or its nominees.'

[4] The 3rd, 8th and 9th defendants did not enter an appearance to defend and it would appear that the whereabouts of these defendants are unknown to the plaintiff.

[5] During the course of the judicial case management process the 4th and 5th defendants entered into settlement negotiations with the plaintiff. Once the matter

² *South African Airways Soc Limited v Camm* (HC-MD-CIV-ACT-DEL-2016/02479) [2020] NAHCMD 103 (20 March 2020).

became settled between these parties, the settlement agreements were filed on 19 May 2020 and 27 September 2021 respectively.

[6] The only remaining defendant who chose to pursue this matter to trial is Joseph Brinkmann, the 6th defendant. Mr Brinkmann is major male residing in Windhoek, and he was employed with the plaintiff in the capacity of a messenger or office assistant and had been so employed since 1990.

[7] Where I refer to the 6th defendant it is with reference to the Mr Brinkmann unless otherwise indicated.

Pleadings

[8] The plaintiff is South African Airways Soc Ltd, a state-owned company registered in terms of the applicable company laws of the Republic of South Africa. The plaintiff pleaded that during March 2009 and September 2013 the respective defendants were employed by the plaintiff in various positions in the plaintiff's Windhoek office.

[9] During 19 August 2013 to 23 August 2013 the plaintiff (through its finance department in South Africa) investigated irregular and high baggage expenditure by the Windhoek station.

[10] A further independent forensic investigation was conducted by the plaintiff's insurers during April 2014 and a report was received accordingly. Plaintiff pleads that because of the investigations it came to realise the extensive fraud, theft and irregularities in respect to and involving the fraudulent baggage claims that have taken place at the plaintiff's Windhoek office.

[11] The plaintiff pleaded that:

- a) the employees would represent to the plaintiff that a lost baggage claim has been registered on the international tracking system known as the 'WorldTracer' system, to which the plaintiff subscribes.
- b) the employees would generate false claims in order to authorize the procurement of a quotation for the replacement of fictitious passenger's lost luggage.
- c) the employees assisted each other to sign the AW307 form, issued on strength of fraudulent quotation and in distributing the cash to fictitious passengers in order to replace fictitious baggage.
- d) after the cash was distributed, a false tax invoice for the fictitious baggage purchase was obtained and presented to the plaintiff by one of the employee defendants for approval and payment.
- e) at all material times the employee defendants were aware that SAA Expense Authorisation form had to be completed by a finance officer, recommended by the Finance Supervisor and approved by the Country Manager.
- f) the employee defendants then shared the proceeds of the unlawful activities.

[12] The plaintiff pleaded that the employee defendants acted jointly and severally all the time being aware of each other's fraudulent actions and assisting each other to defraud and steal from the plaintiff.

[13] As a result of the employee defendants' actions and/or omissions and/or misrepresentation and/or fraudulent activities and /or theft the plaintiff suffered damages in the amount of N\$ 13 265 298.05, which amount was fraudulently misappropriated.

[14] The second claim pertains to the 6th (Brinkmann) and 10th defendant only. The plaintiff plead that on 20 October 2014 the 6th defendant acknowledged to the plaintiff that he was indebted to the plaintiff in the amount of N\$ 109 557.90. The plaintiff pleads further that the 6th defendant, Mr Brinkmann, acknowledged his indebtedness towards the plaintiff for damages suffered as a result of fraud perpetrated by the 6th defendant, whilst he was employed by the plaintiff.

[15] The plaintiff pleads that Mr Brinkmann consented in terms of s 37D(b)(ii) of the Pensions Fund Act for the 10th defendant to deduct the amount of N\$ 109 557.90 from his pension benefit, which he is entitled to be paid in terms of the rules, and to pay the amount to the plaintiff.

[16] The third claim only relates to the 11th defendant (Namfisa). The plaintiff pleads that in terms of s 37D(b)(ii) of the Pensions Fund Act provides that the plaintiff is entitled to compensation (including legal costs) recoverable from any benefit payable to the member in a matter contemplated in sub-paragraph (bb) in the instance where:

- a) The member has in writing admitted liability to the employer; or
- b) Judgment has been obtained against the member in any court including a magistrate's court.

[17] The plaintiff pleaded that as the plaintiff's case is founded in theft, dishonesty, fraud or misconduct, and in the event that judgment being granted as prayed for or partially, the plaintiff will be entitled to compensation in terms of s 37D (b)(ii) and as a result the plaintiff claims any pension benefit accruing to the 1st to the 9th defendants.

Brinkmann's plea

[18] Mr Brinkmann denied having any knowledge of fraudulent activities and pleaded that he was a messenger and at no time carried out any administrative or executive functions while carrying out his employment duties. Mr Brinkmann further pleads that his duties entailed picking up and carrying messages, documents, packages and other items between offices or departments. Mr Brinkmann pleads that he could not have known of the plaintiff's Expense Authorisation form and the procedure therein.

[19] In respect of the written acknowledgment Mr Brinkmann pleads that he was made to sign the acknowledgment under inducement and compulsion without any

explanation as to the contents and the nature of the document. Mr Brinkmann pleads that the plaintiff misrepresented itself and made him sign the document.

[20] Mr Brinkmann further pleads that the written acknowledgment the plaintiff relies on does not meet and comply with the requisites to be met pursuant and for a document to constitute unequivocal admission of liability for purposes of s 37D(b)(ii) of the Pensions Act.

Evidence adduced

[21] In order to understand the context of the pleadings it is important to consider the evidence in this matter. The trial in this matter spanned over days, not because of the complexity of the matter but because of a barrage of documentation to be considered.

[22] The evidence presented by the plaintiff's witness does not necessarily relate to Mr Brinkmann only but is necessary to put the claim of the plaintiff in perspective.

[23] The plaintiff called 3 witnesses to testify on its behalf and Mr Brinkmann was the only witness who testified in support of his case.

On behalf of the plaintiff

[24] The witness called on behalf of the plaintiff are:

- a) Ms Baleseng Pauline Mabena, a Global Baggage Manager.
- b) Phillipina Jacobs, a Specialist in International Remuneration and Benefit, and
- c) Mr Erenst Mudau, Lead Finance: Commercial /Operations.

Ms Baleseng Pauline Mabena

[25] Ms Mabena has been in the employ of the plaintiff in excess of 23 years and at the time of the incident she was employed as the Global Baggage Manager but

currently holds the position of the Head of Customer Services of SAA. Her job entailed managing the plaintiff's baggage operation and the various components of that, which includes:

- a) Normal baggage movement and claims management.
- b) Monitoring and approval of payments to service providers that are used in connection with baggage claims.

[26] Ms Mabena testified that SAA flies to 37 stations and at each of these destinations and as a result it has extensive and strict baggage policy and operating procedures in place. These policies are supported by a further policy as to how employees should handle baggage related matters. Ms Mabena testified that there is also a baggage claim settlement policy in place as well as a passenger service manual. The latter relates to all personnel.

[27] Ms Mabena testified that SAA employs a country manager who would assume the overall responsibility for the entire operation of the station. In the case of the Windhoek station the 7th defendant Juanita Klassen was the Country Manager.

[28] Ms Mabena explained the policy and procedure in the baggage process, in case of damaged/pilfered or lost bags as follows:

- a) When passenger arrives at Hosea Kutako International Airport and there was a baggage irregularity the passenger would complete a report at the airport reporting the baggage problem.
- b) The WorldTracer system is then updated with the passenger's details and a file is allocated. The WorldTracer system is a system that SAA (and other IATA member airlines) use for global luggage tracking. Every time a passenger travels with SAA (or another airline) and there is a problem with their baggage, the incident is logged and a report created.
- c) The reference number generated by the WorldTracer system is a unique number and nobody else in the world will have that reference number. Therefore, claims cannot be duplicated because once a passenger's name

- and travel details across the relevant airlines are entered under the WorldTracer system all the associated airlines that were involved with the passenger's journey would be 'drawn in' under that reference number.
- d) Once the passenger reported the baggage issue the passenger and the WorldTracer file number is captured, the passenger will receive a copy thereof.
 - e) If the passenger's bag is lost, he or she can claim payment for First Need Items, like toiletries and alike. The payment is limited to US\$ 70. The passenger needs to take his or her receipts with a copy of the file (containing the WorldTracer reference) and approach the town office for the reimbursement of expenses.
 - f) Any claim by a passenger must be done by completing and signing a claim form. Such claim form must be accompanied by supporting documents, i.e. a copy of the ticket, sworn statement/affidavit, a copy of the identity document or passport of the passenger, a boarding pass, baggage tag and banking details and receipts, where necessary.
 - g) The claim will then be assessed in terms of SAA's Baggage Service Standard Operating Procedure to determine if the baggage must be repaired or replaced.
 - h) The Baggage Service Standard Operating Procedure directed the procedure to be followed in respect of damaged baggage.
 - i) In the case of damaged baggage, a report needs to be opened at the WorldTracer system and the passengers need to be directed to the nearest approved service provider which repairs damaged baggage.
 - j) In the event of pay outs for damaged baggage an AW307 form must be completed. Certain requirements are in place in respect of the AW307 form, which are as follows:
 - a. The AW307 must contain the passenger's permanent address and phone number and must contain the WorldTracer reference number, reasons for the payment, the cost center number and the cost element.

- b. The passenger must be present personally with his or her identity document or passport.
 - c. The file must be carefully checked to see how much authority has been given before any payment was made and the receipts and AW307 must correspond.
 - d. The agent must witness the AW307 and must be approved by an authorised signatory.
- k) Baggage claims submitted by the Windhoek office would be approved by Ms Mabena's office in Johannesburg. Therefore, if a station like Windhoek wanted to make use of a service provider to provide new luggage to a passenger or to repair broken luggage, the country manager would do a submission to Ms Mabena's office and she would do the final approval.

[29] Ms Mabena testified that agents in the context of the AW307 form is not the customer services agent but the claims agents, however the claims agents are stationed at the airport and are tasked with dealing with baggage related issues. Customer service agents on the other hand deal with ticket sales and reservation matters, which was stationed in the Windhoek town office. In the current matter the customer service officers and not the claims agents were dealing with baggage claims.

[30] Ms Mabena testified that during August 2013 she picked up that the Windhoek station had a high spend on baggage damage and replacements and this bothered her as there was a discrepancy between the actual baggage mishandling and the actual expenditure relating to damaged or missing bags. The actual numbers in relation to missing or damaged bags as reported on the WorldTracer system was exceedingly small, yet the related expenses were extremely high.

[31] Ms Mabena realised there must be a problem at the Windhoek station and initiated an investigation into the discrepancies. A sample investigation was done on the records for the months of April 2013 to August 2013 and it was determined that multiple

payments for replacement baggage were made to specific service providers, which were never authorized in terms of SAA's procurement policies. These vendors were identified as Good Luck Shop, Golden China and Peace Garden Repairs (and Import/Export CC as determined during further investigation).

[32] A team consisting of Ms Mabena, Mr Kgaswane and Mr Mudau travelled to Windhoek to investigate the discrepancies detected in the sample investigation. Upon their arrival in Windhoek the investigation team determined that the customer service agents instead of the claims agents are dealing with baggage claims. In other words, the defendants in the town office dealt with the claims instead of the personnel stationed at the airport.

[33] Ms Mabena testified that several red flags immediately went up in this regard as the defendants in the Windhoek town office ordinarily did not have access to the WorldTracer system and on the odd occasion if the defendants had to access the system it would be done through her office. Ms Mabena testified that she determined through her investigation that the defendants made use of several duplicate WorldTracer reference numbers, and they did not realize that the reference numbers were automatically generated via the WorldTracer system, which in turn generates unique numbers for each baggage claim across each of the member airlines. The witness testified that the defendants manufactured their own 'WorldTracer' reference numbers.

[34] The witness testified that the WorldTracer reference numbers in respect SAA's Windhoek airport operations had the prefix of WHDSA followed by a set of number. Because of the WorldTracer system that is used over multiple airlines and airports there is a very slim chance that the reference numbers would follow a numerical sequence. The witness testified that it is an impossibility to have a numerical sequence because so many airlines across the world would also be opening files and as a result reference numbers are being created at any given time. Yet in the Windhoek office records many of the baggage claims were in numerical sequence and duplication of numbers.

[35] Ms Mabena testified that when she asked to see the damaged baggage, which were purportedly replaced and having regards to the claims there should have been thousands of bags, yet there were only four bags in the storeroom that had been damaged and replaced.

[36] The witness testified that she also came to realise that the 9th defendant, Mr Jeffrey Rukero (Rukero), a security guard of Stallion Security station at the plaintiff's Windhoek town office, was apparently the person who was tasked with the fixing of the damaged bags, and he was the one who determined the costs of the said repairs. Rukero would create his own invoice, sign it and go to the cashier and collect the money.

[37] According to Ms Mabena the only recognized vendor for replacement of baggage in Windhoek is Leder Chic and by exception Holtz. When she considered the invoices and source documents, she could only find eight documents relating to Leder Chic. As for the rest of the 'vendors', Golden China and Good Luck Shop, were not approved vendors, yet the 7th defendant, Juanita Klassen – the country manager, approved all the expenditure in relation to these unauthorized vendors.

[38] During their investigation it was established that Good Luck Shop exists but has never had any dealings with SAA, yet there were receipts from Good Luck Shop that ran into the hundreds, if not thousands.

[39] Ms Mabena testified that it was clear that the defendants manufactured or fabricated hundreds and hundreds of invoices and source documents in order not to fall foul of the standard operating procedure which requires a receipt relating to the bag that was replaced. It further became known that the defendants created their own receipt books for this purpose. The defendants were fabricating the amounts for repairs or replacement of baggage and they were creating fictitious and duplicate reference numbers.

[40] Ms Mabena explained the defendants' *modus operandi* as follows:

- a) A passenger would purchase a flight ticket in cash from service agents, namely the second (Nanuses), third (Manetti) and fourth (Eiman) defendants.
- b) The first to ninth defendants acting with a common purpose then manufactured a false WorldTracer system reference number.
- c) A quotation for the alleged replacement would be obtained on the misrepresentation that such baggage was damaged beyond repair and had to be replaced.
- d) Once the quotation is obtained, the Customer Services Agent would sign off on an AW307 for the amount stated in the quotation and the cash would be dispersed.
- e) Thereafter a false invoice for baggage repairs and/or replacement would be issued, and a SAA Expense Authorisation form would be completed by the relevant customer services agent. The customer services agent would submit the SAA Expense Authorisation form together with the AW307 form, a quotation and invoice to the relevant finance supervisor for approval.
- f) The fifth defendant (Maliah Sam) would then make payment to the other defendants who then in turn appropriate the payment and in most of the claim forms were signed off by the seventh defendant.

[41] The defendant who played an integral part in this scheme was Maliah Sam and Juanita Klassen because each payment would need to be authorized by Klassen whereas Sam was responsible for the cash-ups and cash reconciliation and who captured the various pay outs on the system.

[42] Ms Mabena testified when the multitude of documents were considered it was clear that it was not in compliance with the plaintiff's policies. The documents like the AW307 were partially complete and transactions were approved without particulars of the passenger, the details of employee (pension number), flight number and signature of a witness.

[43] On a question of the court Ms Mabena confirmed that the SAA only had one recognized vendor in Windhoek, i.e. Leder Chic and SAA has not changed vendors in many years as there is a good relationship between Leder Chic and the plaintiff. Ms Mabena testified that if baggage had to be replaced and Leder Chic did not have stock of the said brand product then SAA would either pay out or procure a bag from Johannesburg.

Cross-examination

[44] During cross-examination by Ms Siyomunji addressed the question with the witness whether Mr Brinkmann would have access to the reference numbers purported to be fraudulent or duplication, because he was merely a messenger. Ms Mabena testified that there was a team of people at work in the Windhoek office who worked as a collective in order to successfully pull off a scheme as they did. The witness stated that when the employee defendants realized that they could not use the same reference number repeatedly the defendants started to create their own reference numbers. The witness added that Mr Brinkmann had been an office assistant for years and he would understand the process very well and he was exposed to the WorldTracer system. According to Ms Mabena Mr Brinkmann added a fictitious service provider into the mix as well.

[45] Ms Siyomunji further put it to the witness that Mr Brinkmann would receive money in cash and would be send to the different shops by a member of the office management and would then buy the item and bring the item and invoice back to the office and he had no idea of which of these vendors were authorized and which were not.

[46] Ms Mabena's response was that Mr Brinkmann bought from shops that do not exist and that all the receipts attached to the AW307 as source documents came from the same book. She further added that the reasons for the purchase of new bags were

replacement of baggage, which would mean that the damaged baggage had to be retained by the company and this meant that the storeroom had to be filled with hundreds of damaged bags, yet when the storeroom was inspected there was only four bags in the storeroom.

[47] Ms Siyomunji insisted that Mr Brinkmann would deny the witnesses' evidence that the shop did not exist. Ms Mabena reiterated that Good Luck Shop existed but that it had no dealing with SAA. She further testified that despite searching for the other shops they could not be located. In respect of Golden China Shop the witness testified that the receipts had no physical address as the receipts only contained a postal address. The witness was further adamant that Mr Brinkmann had 'dealings' with all the so-called service providers and that the defendant created an invoice book for the fictitious vendors.

Erenst Mudau

[48] Mr Mudau is employed with SAA since 1997 and currently holds the position as Lead Finance: Commercial/Operations.

[49] Mr Mudau confirmed that he was part of the investigation at the Windhoek Station in August 2013 and that he assisted in drafting the report regarding their findings, which I will discuss hereunder.

[50] Mr Mudau testified that on a regular basis documents clarifying the plaintiff's processes and policies in respect of payment of funds together with the requirements were communicated to the management of the plaintiff's Windhoek office and therefore the financial management staff had knowledge of all the applicable policies. The country manager, Ms Klassen was responsible for enforcing the policies.

[51] Mr Mudau testified that it was clear to management what the expense authorisation policy of SAA was and that they were aware that only suppliers or vendors

with a valid contract in place and where the said contract is uploaded on the SAP system³ could be paid on behalf of the plaintiff. Mr Mudau testified that the 5th defendant and the 7th defendant had full knowledge of the various policies dealing with compensation of baggage claims and settlement and the likes.

[52] Mr Mudau testified that the high baggage expenditure of the Windhoek station was of grave concern, and it was clear that it required a detailed investigation, especially if one has regard to the expenditure from the Windhoek station in comparison with the global expenditure of the plaintiff in respect of damages/pilfered or lost baggage.

[53] Mr Mudau testified that for 2011 the Windhoek station's contribution to the total expenditure amounted to 29% of the global total of claims. In 2012 **is it** amounted to 36% of the global total and for the period April to July 2013 the Windhoek contribution amounted to 54% of the global expenditure⁴.

[54] Mr Mudau testified that during their investigation when they visited the Windhoek station during the period of 19 to 23 August 2013 the investigation team interviewed the employee defendants at the town office and determined that there had been fraudulent baggage claims that had been paid out to these employees, which led to the high baggage expenditure of the Windhoek office.

[55] Mr Mudau confirmed Ms Mabena's evidence regarding the *modus operandi* followed by the defendants but added that the Mr Brinkmann, the 6th defendant and Mr Rukero, the 9th defendants played an integral part in the scheme. Mr Brinkmann was allegedly sent to obtain quotations for the baggage that had to be replaced and Mr Rukero operated a business on the side by the name of Peace Garden from SAA premises, through which Mr Rukero would bill SAA monthly for baggage allegedly repaired.

³ Integrated accounting software platform used by SAA.

⁴

| Year | Actual | Actual | Actual | Total Expenditure |
|------------------|-------------|-------------|-------------|-------------------|
| 2011 | R 3,835,291 | R 3,920,799 | R 1,984,196 | R 13,075,84 |
| 2012 | | | | R 10,794,425 |
| 2013 (Apr-Jul) | | | | R 3,659,219 |
| WDH contribution | | | | |
| | | | | 29% 36% 54% |

[56] Mr Mudau testified that the involvement of Mr Brinkmann and Rukero did not stop there. In the sample of documents considered for the period April 2013 to August 2013 however once the investigation started in earnest it became clear that the fraud started as far back as 2010.

[57] The witness testified that a 108-page schedule was drafted of all the transactions providing a breakdown allocating each of the discovered AW307 to a specific defendant signatory. These AW307 and source documents ran into the thousands. The witness went through a few hundred of these documents with the court and all these purported transactions related to the purchasing of bags from Good Luck Shop, Golden China, China Shop No 5, Import/Export CC and Holtz.

[58] Whilst going through the expenditure claim forms and source documents the witness pointed out in none of these documents were there compliance with the policies and procedures. The forms were incomplete and none of the payments were properly approved as required. The reasons for payments were inevitably indicated as 'replaced' and there were irregularities in respect of the specific details that were required to be included in the specific forms, for example, the details of the passenger, the contact details, the flight number, etc. The forms were completed in lieu of the cash taken from the cashiers, in order be able to balance the books at the end of a business day but all the transactions were fraudulent.

[59] Messrs Mudau and Kagwana also drafted a report which sets out their findings during the investigation in August 2013. The findings were limited to a sample period of April 2013 to August 2013. Mr Mudau testified that during the sample period most of the baggage was 'bought' at Golden China. This shop was not an approved vendor and upon enquiries from the staff Mr Mudau could not determine if this shop existed and none of the staff members at the plaintiff's offices knew what the location of this shop was. When the owner of the shop was eventually located it was determined that this

shop was no longer operating since September 2012, yet the amount of N\$ 1 636 568.68 was supposedly spend at the Golden Shop during April to August 2013.

[60] In respect of Good Luck Shop Mr Mudau testified that this shop is not an approved vendor and when this shop was located it was determined that this shop never did any business with SAA nor did it issue the invoices purportedly issued by this shop, yet an amount of N\$ 62 352 was spend at this shop during the sample period, of which Mr Brinkmann spend N\$ 50 861 in respect of baggage replacements.

[61] Shops like Holtz was investigated as well as Leder Chic, which is an approved vendor but all payments to this service provider are done by electronic funds transfer and the payments made for the period 2010 to August 2013 in favor of Leder Chic amounted to N\$ 346 000. As for Holtz, Mr Mudau testified that under exceptional circumstance a bag would be purchased from Holtz. Mr Mudau further testified that during the investigation it was determined that quotations were obtained from this shop by Mr Rukero but that he would not return to purchase the bags. During the sample period the register that was kept at the Windhoek Town office indicated that three payments were made to Holtz and on two occasions the passenger signed the register upon receipt of the replacement baggage.

[62] Mr Mudau testified that when the investigation team attempted to interview Mr Brinkmann he vanished from the office and did not return to work by the time they returned to Johannesburg.

[63] Mr Mudau testified that during their investigation it was determined that replacement bags to the value of N\$ 13 265 298.05 were allegedly purchased from vendors that do not exist.

Cross-examination

[64] Mr Mudau was confronted with the question as to why it took the plaintiff so long to detect the fraudulent activity. Mr Mudau testified that SAA used an integrated accounting software platform (SAP system) and the defendants (more specifically the financial manager and country manager) bypassed the system by not making use of approved vendors. The witness testified that the plaintiff has a variance analysis, and it monitors vendor accounts, but this system could be by-passed by not allocating the expenses to the relevant vendor accounts. In the event of a non-approved vendor then the Johannesburg office could condone it upon application by the country manager. The witness also confirmed the evidence of Ms Mabena that Leder Chic is the only approved vendor of the plaintiff and the legitimate transactions for the period April 2010 to August 2013 amounted to N\$ 307 954.90, which was transferred into the vendor's account via electronic funds transfer, never cash.

[65] Mr Mudau testified that the money for the alleged purchases were taken from the cash takings by the customer care agents (1st to 3rd defendants). He testified that the purchases could not be done from the petty cash as the petty cash is capped at N\$ 3000, which was replenishable. All other cash had to be banked on daily basis.

[66] Mr Mudau testified that the SAP system will only recognises transactions made to the allocated vendors. In the event that the Windhoek station had to make use of a vendor that is not approved then condonation or permission could be sought from the Johannesburg office.

Philipina Jacobs

[67] Ms Jacobs is now technically retired however during May 2021 the plaintiff recalled her to assist with the winding up of the regional sections of the plaintiff.

[68] During the period in question part of Ms Jacobs' portfolio was to deal with the plaintiff's international employees and more specifically in respect of the remuneration, benefits, pay roll and implementation of Human Resource Policies.

[69] Ms Jacobs dealt in her evidence with each of the employee defendant, date of employment and position held with the plaintiff as well as what their duty sheet would consist of.

[70] Ms Jacobs testified that Mr Brinkmann was employed by the plaintiff on 16 March 1990. His duties would consist of delivery and collection of damaged baggage but nothing more in regard to baggage claims or issues.

[71] Ms Jacobs testified that according to her knowledge the policies and updates thereto were communicated to the various staff members, department heads and management by email. Ms Jacobs testified that there is no reason for her to doubt that the 1st to 9th defendants were aware of the relevant policies specifically the policies to baggage service standards and processing, as far as it related to them.

[72] After the plaintiff uncovered the massive fraud/theft that was being committed by the employees at the Windhoek town office disciplinary proceedings were initiated against the defendants. Disciplinary hearings were held and although Ms Jacobs was not personally present during the disciplinary hearing she is aware of the outcome of such disciplinary hearings.

[73] Ms Jacobs testified that except for the 5th, 7th and 8th defendants the services of the remaining defendants were terminated. Mr Brinkman in writing admitted his liability in the amount of N\$ 109 887.00

[74] That concluded the plaintiff's case.

Defendant's case

[75] Mr Brinkman testified in person and called no witnesses.

[76] Mr Brinkman testified that he started his employment with SAA in 1990 and was in its employ until August 2013. During this period he was employed as an office assistant and his duties included cleaning of the premises, picking up and carrying messages, documents and packages, and other items between the offices and departments within the establishment of the plaintiff and to other business.

[77] The witness testified that he started working under the now deceased Mr Du Plessis in 1990 and the system that was in place during 2013 dates to those early days of his employment, i.e. he would receive instructions from his supervisor on a daily basis to go and collect quotations for baggage that was damaged. He would then receive the cash according to the quotation whereafter he would proceed to pay and collect the baggage and bring it back to the office, with the relevant receipt.

[78] This system apparently changed in 2007 in the sense that other employees and not only management could send him to purchase baggage. Mr Brinkman testified that he was sent by the 1st to the 4th defendants to go and purchase the required baggage and he would return with the item and the receipt. The person who sent him would then complete the relevant paperwork and insert the passenger number. The witness testified that he never carried out any administrative or executive functions whilst carrying out his duties.

[79] Mr Brinkman testified that he was diagnosed with tuberculosis (TB) in 2010 and was absent from work from January 2010 until the end of August 2010.

[80] Mr Brinkman testified that in 2014 he was instructed by the plaintiff to sign a written acknowledgment of debt without prior explanation as to the contents and the nature of the document that he signed. He was however informed that the document formed part of the plaintiff's forensic investigation. Mr Brinkman testified that he had no knowledge of any fraudulent activities and has no knowledge of the SAA Expense Authorisation for and the procedure therein.

[81] Mr Brinkmann testified that after his suspension he was criminally charged and was detained but he paid bail. The matter was later withdrawn. Mr Brinkmann complained that despite the withdrawal of the criminal charges his pension was to date not paid out to him. In the interim he was dismissed.

Cross-examination

[82] During cross-examination by Mr Jones the following evidence was elicited:

- a) Mr Brinkmann could read and write and his highest grade in school was grade 8. He was presented with a page with his name printed on it as well as certain numbers by counsel and was requested to rewrite it in his own handwriting, which he did.
- b) Mr Brinkmann denied that he worked together with other employees, with a common purpose to defraud the plaintiff.
- c) Mr Brinkman denied that he ever received any money from any of the defendants which he appropriated for himself. Mr Brinkmann testified that the only money he would receive would be to purchase baggage and he would return with the receipt and the change.
- d) Mr Brinkmann confirmed that he completed expense forms by inserting the company name, the item, the amount and signature.
- e) Mr Brinkmann explained the procedure that was followed in case of damaged baggage testifying that he would be sent to buy a bag and he would go to different shops depending on the nature of the bag that needed to be purchased. He would know what bag he was looking for as the broken bag would be brought to the office. He would go to shops like Golden China, China Shop No 5, Good Luck Store, which stock these types of bags, the witness however testified that he did not shop at Import/Export CC and cannot recall ever going to the said shop.
- f) Mr Brinkmann could not furnish a physical address for Golden China Shop, China Shop 5 and Import/Export CC but testified that the China Shops were all located in the same street as Ellerines in town. He stated that he did not

- know where Import/Export CC was and that Mr Rukero (9th defendant) would know better.
- g) When asked to identify signature on Official Receipts for Cash Dispersed document and a source document, i.e. a receipt from China Shop No 5 dated 15 April 2010⁵ the witness confirmed his signature appears on the form at the heading received.
 - h) Mr Brinkman confirmed his handwriting and signature on an Official Receipts for Cash Dispersed documents dated 26 June 2010 and 13 August 2010 respectively in favor of China Shop No 5 and on the same date (13 August 2010) in favor of Import/Export CC. Mr Brinkmann admitted to 8 sets of documents wherein he either completed or signed for the money during the period April to August 2010⁶.
 - i) When confronted with his earlier evidence that he was booked off due to Tuberculosis for the period April to August 2010, yet his handwriting and signatures appears on official receipts for cash dispersed during that period, Mr Brinkmann testified it was not his handwriting and somebody must have forged his handwriting.
 - j) When questioned further Mr Brinkmann testified that it was his handwriting but that he did not know the date and that he was not at work as he had TB. The witness denied that he participated in committing fraud whilst on leave but could not explain the documents containing his handwriting and signature.
 - k) Mr Brinkman testified that all the damaged bags would be handed over to the service agent after he purchased the new bag and the broken bag/suitcase would be kept in the storeroom but could not explain, in light of the number of bags replaced, why Ms Mabena would say she only found 4 bags in the storeroom during their investigation.
 - l) In respect of the frequency of the purchasing of new bags Mr Brinkmann testified it could be 3 or 4 bags per day or sometime 3 or 4 a week. He

⁵ Exhibit C2 at p 121 of Discovery bundle.

⁶ A schedule of the documentation wherein either the handwriting or the signature of Mr Brinkmann appears, or both is attached hereto as an addendum.

testified that he was not the only one who purchased bags and that Mr Rukero would also be send to purchase bags.

Arguments advanced

[83] This court had the benefit of comprehensive closing arguments in this matter I would like to thank counsel for their industry herein. I do not intend to repeat it as would be a replication of the evidence already summarized.

Evaluation of the evidence and discussion

[84] The three witnesses called on behalf of the plaintiff made a very favorable impression on this court. Their evidence was clear and concise and to the point. The three witnesses are stationed in different departments of the plaintiff, i.e. Human Resources, Finance and Baggage Department.

[85] The evidence of Ms Jacobs related to the defendant's job description and that there was no reason to believe that the 6th defendant was not aware of the policies and procedures specifically relevant to him.

[86] Ms Jacobs confirmed that there was disciplinary proceedings pursuant to which the defendant was dismissed. The defendant admitted liability in the amount of N\$ 109 887.00.

[87] The witnesses that were able to bring the facts in this matter into perspective regarding the policies and procedures regarding the baggage handling and the replacement thereof are Ms Mabena and Mr Mudau. These witnesses were personally involved in the investigation of the irregularities that were detected at the Windhoek office and flew to Windhoek to interview the staff members. The evidence of both these witnesses is supported by a multitudes of documentary proof.

[88] Neither Ms Mabena nor Mr Mudau were discredited during cross-examination. Their evidence did not contain any inconsistencies or inherent contradictions. Neither of the witnesses have any personal interest in the matter before court and do not know the 6th defendant personally and clearly have no personal issues with the 6th defendant.

[89] The same cannot be said of the defendant. The defendant was a poor witness who tailored his evidence according to the questions directed at him. I must go further and say that not only was he a poor witness, he was an untruthful witness.

[90] Mr Brinkmann was at the beginning of his cross-examination requested to write a few words in his own handwriting. These were words like his name and surname, a few figures and the word suitcase. The defendant proceeded to write these words in Damara>Nama. He clearly knew where this exercise was going. Counsel then requested to rewrite the following typed words, i.e. suitcase, twee nege nege (two nine nine), replacement and 1899. This was done in the presence of Mr Brinkmann's legal practitioner.

[91] Hereafter Mr Brinkmann was shown documents starting from April 2010 to identify. The documents were AW307 forms and he identified his handwriting on all the documents presented to him. The forms were completed by Mr Brinkmann and he signed for the money as received on his own admission. At this stage, on a side note, it is important to note that the defendant's evidence up to this point was that he did not have any knowledge of the administrative side of the business and that he never completed any expense authorisation forms or AW307 forms or the procedure therein.

[92] When confronted with the fact that he earlier testified that he had TB in 2010 and was booked off from April to September 2010 and how it was possible that his handwriting and signature appeared on those documents the witness back-pedaled and then suggested that somebody must have forged his handwriting. When pressed on the issue during cross-examination Mr Brinkmann admitted that it was his signature but denied the handwriting.

[93] Mr Brinkmann alleged that he would be send get a quotation in respect of damaged baggage and would thereafter be handed money and go and replace the said baggage. According to the AW307 of 2010 Mr Brinkmann received the money for the so-called replacement baggage, yet he was on sick leave. I have no doubt in my mind that the defendant is telling blatant untruths to try and hide is role in this scheme to defraud the plaintiff.

[94] What is even more disturbing is if this court has regard to the handwriting sample provided by Mr Brinkmann in court and compares it not only to the AW307 documents, which the defendant admitted to having completed it, there can be no doubt that the same handwriting also appears on the source documents received from the so called vendors. Mr Brinkmann denied that he completed any of the invoices received from shops like China Shop 5 for example, however Mr Brinkmann has a very distinctive writing style and I would be hard-pressed not to find that it was Mr Brinkmann who completed many of the invoices himself.

[95] What is further interesting is Mr Brinkmann's selective memory when it comes to where these shops are located. Mr Brinkmann is extremely vague about where shops like Golden China and China Shop No. 5 were situated. In respect of Import/Export CC Mr Brinkmann denied that he ever went there to purchase bags and did not know where this business was situated however a number of AW307 forms were presented to him, which he completed in his own handwriting and where he received the cash for the replacement bags.

[96] According the schedules of transactions presented to court Mr Brinkmann purportedly purchased replacement luggage from Golden China during 2012 to 2013, however by that time according to the investigation by Mr Mudau it was clear that the dates of purchases were after this particular shop had been closed for months already.

[97] It is undisputed that the policy is that the damaged baggage must remain with the plaintiff's office and the new luggage would be handed to the passenger. It is further undisputed that the AW307 had to contain the particulars of the passenger concerned. This passenger must also sign a register upon receiving the new luggage.

[98] According to Mr Brinkmann he was unaware of that register and procedure concerning that concerns the handing over of the baggage to the passenger. However, I find that to be improbable. Mr Brinkmann was employed by the plaintiff since 1990, probably longer than anybody else in that office and he must have been aware of the register. That register was also in use because Mr Mudau testified that the two transactions done at Holtz were recorded in the register and the passenger signed for the replacement baggage.

[99] If Mr Brinkmann is telling the truth about the system and the frequency that luggage was damaged and had to be replaced there must have been thousands of bags in the plaintiff's storeroom. It literally had to be flooded by it, yet during the investigation in August 2013 the witnesses recovered 4 bags only in the storeroom.

[100] Confronted with this fact Mr Brinkmann testified that there were many more bags in the storeroom that he saw during the investigation, however, Mr Brinkmann was not at work during the period of investigation. He was missing in action during this time. He remained missing in action to the extent that the country manager at the time had to take and serve the notice of his disciplinary hearing on him at his home.

[101] When asked by Mr Jones during cross-examination how often bags were replaced in any given week Mr Brinkmann testified three or four bags would be replaced per week. This yet again appears to be improbable. As indicated earlier in the summary of the evidence of the plaintiff's witnesses there are in the excess of 7000 documents filed for replacement bags. Mr Brinkmann would be running around all day every day collecting quotations and replacing bags from the various vendors. He would not have

time to do anything else, yet he is unable to pinpoint the specific location and address of the respective 'vendors' except for Leder Chic and Holtz.

[102] One should also keep in mind that the evidence of Ms Mabena was that SAA would never purchase sub-standard luggage when a passenger's luggage were damaged and here was the office assistant that would merely gauge the damaged baggage with the eye and then run to the nearest China Shop for a replacement bag. No passenger, with high-end luggage would settle for sub-standard luggage in any event. I do not for a moment believe that Mr Brinkmann did not know who the approved vendors were. It is yet again a poorly fabricated story on his part.

Legal Principles

Handwriting specimen

[103] The first aspect of this matter that needs some discussion is the handwriting samples of Mr Brinkmann that was obtained in court and used for comparison purposes of the AW307 documents and source documents.

[104] Applicable to the current scenario before me is s 4 of the Civil Proceedings and Evidence Act, 25 of 1965, which reads as follows:

'Evidence of genuineness of disputed writings

4. Comparison of a disputed writing with any writing proved to be genuine may be made by witnesses, and such writings and the evidence of any witness with respect thereto may be submitted as evidence of the genuineness or otherwise of the writing in dispute.'

[105] The plaintiff's witnesses were of the view that Mr Brinkmann did not only complete AW307 forms but also source documents. None of the AW307 forms were placed in dispute. As indicated Mr Brinkman denied that he completed any of the invoices, but cannot explain why handwriting similar to his appears on these documents. It is no surprise that Mr Brinkman denies the existence of his handwriting on source documents, even where it would be evident to the untrained eye that it is the

same handwriting. The reality is that if he would admit that his handwriting appears on these documents it would amount to an admission that he was part and parcel of the scheme to defraud the plaintiff.

[106] The court in *S v Boesak*⁷ Smallberg JA stated as follows

[54] In our view, therefore, the State has proved the admissibility and authenticity of the letter under discussion beyond reasonable doubt. In coming to this conclusion we have relied solely on the facts as they emerged during the trial and the well-known rules of our common law relating to the establishment of prima facie proof, the absence of a rebuttal thereof and the burden of proof in a criminal case.

[55] It may be that the authenticity of the signature itself was not a matter to which King herself testified, nor in relation to which the trial Judge made a finding. What remains is the fact that there is a document which purported to be part of correspondence between the appellant and the recipient which required an explanation from the appellant, more particularly because of his control of the FPJ and its stationery and the extraneous evidence that he was in communication with the recipient and the only person concerned with the recipient. It would be like a typed (but unsigned) note found in exactly the same circumstances: if the only reasonable explanation on the face of it is that the appellant is the author, then its contents would be admissible against him. And, if his explanation in relation to the document is that he was not the only person concerned with the recipient or that it is not authentic or the like, then he must testify to it in his defence.

[56] There is, however, further and perhaps more conclusive proof of the authenticity of the letter. It is the following. In the record of the case before this Court, all the exhibits were retyped. We did not have the original or a photo-copy of the letter of 30 March 1988 before us. We subsequently called for the original or a photo-copy thereof, which was received by the Registrar. We have compared the signature on the letter with that of the appellant at the end of his affidavit supporting the application for leave to appeal. The signatures are identical, or at least apparently so. The comparison at least establishes a prima facie inference that the letter was written and signed by the appellant. In the absence of rebuttal, it becomes, under the circumstances of the case, conclusive proof.

[57] That the Court itself is allowed to compare the handwriting of the appellant on the letter with other genuine specimens of his signature is acknowledged in our law, as in several

⁷ *S v Boesak* 2000 (3) SA p381 at 399 [54] to [58].

other legal systems. This was laid down by the Full Bench of the Orange Free State in *R v Kruger* 1941 OPD 33 at 38, after an exhaustive review of the comparable position in England. (See also s 228 of the Criminal Procedure Act 51 of 1977.)

[58] The rule seems to be correct in principle. Even in cases where expert witnesses testify, it is the Judge who bears the responsibility of making a final judgment. (*Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 370E - H; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616D - 617C. See also Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed at 104 - 6.) The position in our law is, in essential respects, similar to that obtaining in the United States (Wigmore *On Evidence* paras 2129 et seq); Australia (*Adami v The Queen* (1959) 108 CLR 605 (High Court of Australia) at 616 - 17); Canada (*R v Abdi* (1997) 34 OR (3d) 499 (CA)) and England (*R v Rickard* (1918) 13 Cr App R 140; Cross and Tapper *on Evidence* 8th ed at 761; and Phipson *F Evidence* 14th ed paras 17-15 and 17-16). The rule under discussion should be applied with caution. But, taken in conjunction with all the other factors indicative of the authenticity of the letter discussed above, this Court is entitled to conclude, prima facie, that it was written and signed by the appellant. In the absence of evidence to the contrary and having regard to all the other indicia mentioned above, we are satisfied that the authenticity of the letter has been proved beyond reasonable doubt.' (My emphasis).

[107] From reading the *Boesak* matter is evident that the court is allowed to make the comparisons with other genuine specimen of handwriting of the defendant but with proviso that the court should do so with caution and in conjunction with all the other factors. After having considered hundreds of documents where Mr Brinkmann's handwriting appears and on an objective comparison of the handwritings I am in the position, considering all the factors and the absence of evidence to the contrary, to find that it is indeed Mr Brinkmann's handwriting that appears on a multitude of the 'vendor invoices'. I have no doubt in my mind that he, together with the other defendants, issued fraudulent invoices in support of the baggage claims filed in the AW307 claim forms.

Common purpose

[108] This court already granted default judgment against the 1st, 2nd and 7th defendants and made a finding that the defendants acted with common purpose in their fraudulent actions. The principle of common purpose applies to our law to delictual claims.

[109] In the *McKenzie v Van Der Merwe*⁸ in a dissenting judgment C.G. Maasdorp JA said on that point of law that:

‘According to the Digest (47, 2, 54, 4), "he who knowingly furnished instruments for stealing is liable, although he did not counsel the theft." This law we find laid down also by Van der Linden (2,1,8), and *Matthaeus*, in his work on Crimes (1, 11). Here the writers speak of crimes from which a civil liability for damages arises. In *Voet* (47, 2, 7) special mention is made of the liability of a person who lend a thief a ladder, well knowing what it was to used for.’

[110] This view remains true to and was applied in *Cipla Medpro v Aventis Pharma (139/12) Aventis Pharma SA v Cipla Life Sciences*⁹ where the court confirmed the position as set out in the *McKenzie* matter. This court also followed the aforementioned authority in and earlier judgment in *South African Airways Soc Limited v Camm*¹⁰ when the plaintiff sought judgment against the 1st, 2nd and 7th defendants.

[111] As Mr Jones correctly pointed out, the only issue remaining is to link Mr Brinkmann to the fraudulent scheme. Having considered the evidence of Ms Mabena and Mr Mudau and that of Mr Brinkmann, who in my view was his own worst enemy during this trial, then there can be no doubt in my mind that Mr Brinkmann played an integral part in making the scheme work. Each of the defendants had a role to play and all had to be knee-deep into it because if not there would the danger of someone talking and coming out with the whole bag of beans.

[112] Mr Brinkman relies very heavily on the fact that he is a lowly office assistant and would not have access to WorldTracer reference numbers for example. The beauty of the scheme is that he did not need to have access to the codes and reference numbers to be able to defraud the plaintiff, because those defendants that would have access to reference numbers and codes were part of the scheme and they would provide it as needed. In fact they went as far as fabricating their own reference numbers.

⁸ *McKenzie v Van Der Merwe* 1917 AD 41.

⁹ *Cipla Medpro v Aventis Pharma (139/12) Aventis Pharma SA v Cipla Life Sciences* (138/12) [2012] ZASCA 108 (26 July 2012).

¹⁰ *South African Airways Soc Limited v Camm* (HC-MD-CIV-ACT-DEL-2016/02479) [2020] NAHCMD 103 (20 March 2020)

[113] What made Mr Brinkmann important is that he would under normal circumstances do the footwork and go and get quotations at the plaintiff's approved vendors, therefore if Mr Brinkmann says he went around to get quotations and collect the replacement bags it would raise no eyebrows.

[114] I do not for a moment think that Mr Brinkmann got the biggest slice of the pie when it came to dividing cash amongst the defendants, but then that it is not the criteria when a court deals with the principle of common purpose. However, it is clear that Mr Brinkmann is a joint wrongdoer with the co-defendants and is liable jointly and severally.

[115] In *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank*¹¹ the court drew the distinction between joint and concurrent wrongdoers as follows¹²:

'[10] At common law a distinction is drawn between joint wrongdoers and concurrent wrongdoers. (The latter are sometimes referred to as "several" wrongdoers. Joint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict. They are jointly and severally liable. Concurrent wrongdoers, on the other hand, are persons whose independent or "several" delictual acts (or omissions) combine to produce the same damage. It was accepted¹³ that, subject always to there being an intact chain of causation, one concurrent wrongdoer may be sued for the full amount of the plaintiff's loss, ie that concurrent wrongdoers are liable *in solidum*.'

[116] Mr Brinkmann was part and parcel of the scheme and that is clear from documentary evidence presented to this court. Mr Brinkmann knew very well what he was involved in and that is why there are claim forms and source documents with his handwriting on while he was on sick leave.

[117] The final nail in the coffin in this matter is the acknowledgment signed by Mr Brinkmann in respect of N\$ 109 557.90. Interestingly enough Mr Brinkmann belatedly pleaded that he was coerced into signing the document and he did so without

¹¹ 1998(2) SA 667 (W).

¹² All the references omitted.

¹³ *Union Government (Minister of Railways) v Lee* 1927 AD 202.

understanding the contents of the acknowledgement. This issue was not taken much further by the defendant and his plea is a bare denial of the facts, nothing more, and nothing less.

[118] Having considered the totality of the evidence I am satisfied that the defence raised by the defendant is false and stand to be rejected. The plaintiff has proven its case on a balance of probabilities and the 6th defendant, i.e. Mr Brinkmann should be held liable together with the 1st, 2nd and 7th defendants on a joint and several basis.

[119] It should be noted that the plaintiff reached a compromise with the 4th and 5th defendants and that in my view removes them out of the current equation.

The second claim against the sixth defendant only

[120] This claim relates to the acknowledgment by Mr Brinkmann that he is indebted to the plaintiff in the amount of N\$ 109 557.90. The parties did not reach a compromise in this regard. It is clear from documents before me that if we look at actual indebtedness then Mr Brinkmann owes the plaintiff closer to a quarter of a million if not more.

[121] I am the view that in light of my findings on the first claim where the 6th defendant is jointly and severally liable with the other defendants that the payment in respect of claim two should be inclusive of the first claim. The defendant consented in terms of s 37D(b)(ii) of the Pensions Fund Act for the 10th defendant to deduct the amount of N\$ 109 557.90 from his pension benefit, which he is entitled to be paid in terms of the rules, and to pay the amount to the plaintiff.

Cost

[122] Mr Jones argued that this court should grant a punitive cost order against the defendant on an attorney and client scale.

[123] Cost is and remains in the discretion of a court. The defendant is represented on a pro bono basis as submitted by his legal practitioner, Ms Siyomunji, who informed this court that the 6th defendant legal aid application was declined. I am therefor of the considered view that the 6th defendant is in no financial position to defray a cost order issued against him.

[124] In spite of strong argument advanced by Mr Jones I decline to grant a punitive cost order against the defendant.

[125] Having considered the evidence and arguments advanced, my order is as follows:

Judgment is granted against the Sixth Defendant jointly and severally with the First, Second and Seventh Defendants against whom judgment was granted on 20 March 2020, the one paying first to absolve the others, in the following terms:

1. Payment in the amount of N\$ 13 265 298.05;
2. Interest at a rate of 20% per annum calculated from 19 August 2013 until date of payment in full;
3. No order as to costs.

As against the Tenth Defendant

4. The Tenth Defendant is hereby authorized and ordered in terms of section 37D of the Pension Funds Act 24 of 1956, to deduct from the Sixth defendant as former members of the Namflex Pension fund now known as the Alexander Forbes Namibia Retirement Fund (Pension Section) the amount of N\$ N\$ 109 557.90
 5. The Tenth Defendant is hereby authorized and ordered in terms of section 37 D of the Pension Fund Act, 24 of 1956 to pay the amounts to the Plaintiff or its nominees.
-

J.S. Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

Adv JP Jones

INSTRUCTED BY:

Ellis Shilungudwa Inc., Windhoek.

6th DEFENDANT:

MS M Siyomunji

OF:

Siyomunji Law Chambers , Windhoek.